

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, Dec 20554

In the Matter of

Acceleration of Broadband Deployment)	
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	WC Document No. 11-59
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

COMMENTS OF THE CITY OF MINNEAPOLIS, MINNESOTA

I. Introduction

The City of Minneapolis files these comments in response to the Notice of Inquiry (“NOI”), released April 7, 2011, in the above-entitled proceeding. Through these comments, the City of Minneapolis seeks to provide the Commission with information regarding its local right-of-way and facility management practices and charges and to communicate the City’s position on federal regulation in this area.

Minneapolis urges the Commission not to interfere with the regulatory regime for public rights of way and for siting telecommunications uses on public rights of way and public property. The City of Minneapolis has developed considerable expertise in applying its policies to protect and further public safety, economic development and other community interests. Managing public rights of way is a key part of the governmental policy and operations of the City of Minneapolis and of most local governments. It is an area that involves extensive planning and extensive investments in planning as the City considers the best policies to implement in structuring their public rights of way and in determining the mix of various modes of transportation. The City of Minneapolis is actively working on developing extensive

transportation networks for various modes of transportation. This includes networks for bicycles, pedestrian precincts, light rail transit zones, possible implementation of street cars, and various other transportation components. As the City conducts these studies and then acts upon them they are required to make policy decisions which require the weighing of various interests in determining how various elements of City infrastructure will be managed. The City needs the freedom, to the extent possible to make these determinations. On the other hand, the City of Minneapolis has every interest in expanding broadband deployment and in making available every possible opportunity for the full development of various telecommunications networks. The city of Minneapolis has worked hard on this and prides itself in being a leader in both communications and transportation.

II. City Right of Way Management

The City of Minneapolis has successfully managed its property to encourage deployment of several broadband networks to date. As a result, broadband service is available to 97% of the households and businesses in our jurisdiction. There is no evidence that our policies or charges, with respect to the placement of facilities in public rights of way or on City property, has discouraged broadband deployment. Our community welcomes broadband deployment and our policies allow us to work with companies willing to provide service. No company that we are aware of has cited our policies to us as a reason that it will not provide service. We believe our policies have helped to avoid problems and delays in broadband deployment by ensuring that broadband deployment goes smoothly for both the providers and the larger community. For example, the City of Minneapolis cooperated with USI Wireless to place broadband on City light and traffic poles every two blocks throughout the entire City. We think Minneapolis is an example of a City that is broadband friendly.

We urge the Commission not to interfere with local management of the right of way. We believe that we have been successful in handling applications for various telecommunications uses and that the system that we have in place is working.

We note that the State of Minnesota already has an extensive regulatory regime in place. Minnesota Statutes, Section 237.162 (<https://www.revisor.mn.gov/statutes/?id=237.162>) and 237.163 (<https://www.revisor.mn.gov/statutes/?id=237.163>) provide telecommunications users with extensive rights and a forum for resolving disputes with local governments. Additionally, the Minnesota Public Utilities Commission pursuant to Minnesota Statutes, Section 237.163, Subd. 8 has enacted Minnesota Rules, part 7819, providing additional guidance on managing public rights of way in Minnesota as it relates to telecommunication users. Additionally, Minneapolis has enacted ordinances with the procedures to be followed in utilizing public rights of way for private facilities. These ordinances include Chapter 429 (<http://library.municode.com/index.aspx?clientID=11490&stateID=23&statename=Minnesota>), Chapter 430 (<http://library.municode.com/index.aspx?clientID=11490&stateID=23&statename=Minnesota>), and Chapter 95 (<http://library.municode.com/index.aspx?clientID=11490&stateID=23&statename=Minnesota>) of the Minneapolis Code of Ordinances. Those uses that are located on towers are covered by Chapter 535, Article 8 of the Minneapolis Code of Ordinances (<http://library.municode.com/index.aspx?clientID=11490&stateID=23&statename=Minnesota>). Land use approvals in Minnesota are already covered by Minnesota Statutes, Section 15.99 (<https://www.revisor.mn.gov/statutes/?id=15.99>) which guarantees that applications will be acted on in most cases within 60 days and in other cases, within 120 days. Communications towers require a conditional use permit in Minneapolis, which requires approval of the Minneapolis

Planning Commission. There are specific criteria for these towers and a specific process for review and appeal of the determinations. The Zoning staff member who works in this area recalls only one denial in the last 10 years. Telecommunication uses in the public right of way that don't require a tower require only a permit from the utility connections office in the Minneapolis Department of Public Works. If it is a commercial use on private property the use would require an administrative permit under the Zoning code. In Minneapolis, it typically takes from two to three weeks to get a permit for underground fiber, for ground equipment, or for overhead lines on existing poles in the public right of way. It can be much less. There is a consultation process that takes place between the various City departments to make sure that unnecessary conflicts with existing and planned facilities are avoided. There are areas in Minneapolis where the underground environment beneath the streets is very crowded. City staff work to accommodate all uses to the extent possible. Minneapolis believes that it already has, along with the State of Minnesota, an effective system in place for managing public rights of way while accommodating telecommunications uses.

If the Commission adopts further federal rules in this area, the Commission could disrupt an already effective process at substantial cost to taxpayers. The City does not believe that regulating public right of way, public facilities, or public property that is owned by Minnesota cities (that are under Minnesota law a subdivision of the State) is an appropriate place for federal regulation.

III. The Commission should not regulate State and local rights of way.

Under Minnesota Law and pursuant to Article 12, Section 3 of the Minnesota Constitution, cities are created by the legislature and the legislature alone determines their organization, administration, and functions. Under Minnesota Supreme Court precedent,

Minnesota cities are a subdivision of the State for the convenient exercise of such powers as may be entrusted to them. Monaghan v. Armatage, 218 Minn. 108, 15 N.W.2d 241 (1944) appeal dismissed 323 U.S. 681, 65 S.Ct. 436, 89 L.Ed.. In governing telecommunications users in using public right of way the City of Minneapolis, in addition to acting as a subdivision of the State, is acting pursuant to a State regulatory regime. While under Monaghan v. Armitage, supra, and following cases and under the Minnesota State Constitution, the State is said to have the right to control or even seize municipal property, the federal government has no such right. The federal government is a separate sovereign. The federal government would be interfering with the management of sovereign State property. As was said in Printz v. United States, 521 U.S. 898, 928, 117 S.Ct. 2365, 2381, 138 L.Ed.2d 914 (1997): "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."

Regulating public rights of way and making policy decisions about the management of public infrastructure is the proper sphere of authority for the City of Minneapolis acting as a subdivision of the State of Minnesota and acting pursuant to State and local procedures for siting telecommunication uses in the public right of way or on public property. The Commission is not in an appropriate position to make that policy decision. These decisions require a balancing of various sovereign interests in determining the details of siting various uses on public property or within public infrastructure owned by State entities. In New York v. U.S., 505 U.S. 144, 163, 112 S.Ct. 2408, 2421, the U.S. Supreme Court quoted Texas v. White, 7 Wall. 700, 725 (1869) saying "[N]either government may destroy the other nor curtail in any such substantial manner the exercise of its powers". Local government property management under Minnesota Law is an exercise of sovereign State governmental power. This is particularly true in the light of extensive State regulation in this area and in light of the State's statutory right to designate local

roads as State trunk highways without compensation. See Minnesota Statutes, Section 161.16 (https://www.revisor.mn.gov/statutes/?id=161.16&year=2010&keyword_type=all&keyword=designation+trunk+highway) . As a result, under Minnesota law, local roadways are subject to being transferred to the direct jurisdiction of the State. In Nixon v. Missouri Municipal League, 541 U.S. 125, 140, 124 S.Ct. 1555, 1565, 158 L.Ed.2d 291 (2004), the U.S. Supreme Court was discussing a preemption argument and the relationship between a State and its municipal subdivisions. The Court said:

“But the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, “are created as convenient agencies for exercising such of the government powers of the State as may be entrusted to them in its absolute discretion.” Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 607-608, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) ... Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424, 433, 122 S.Ct. 2226, 153 L.Ed.2d 430 (1991).... Hence the need to invoke our working assumption that federal legislation threatening to trench on the State’s arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power, in the absence of the plain statement Gregory requires. [Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)]

As a result, the Supreme Court has made it clear that federal statutes are not to be read in a way that assumes that legislation intends to authorize interference in the relationship between the State and its subdivisions. States are allowed to use their municipal subdivisions to govern right of way to serve their sovereign interests . Printz v. U.S., 521 U.S. 898, 925, 117 S.Ct. 2365, 2380, 138 L.Ed.2d 914 (1997) makes clear that the federal government may not compel the States to implement federal regulatory programs. The City requests that the FCC choose an approach to accelerating broadband deployment that does not include asserting authority to control State and local governments in their fundamental responsibility of managing their property and their public rights of way.

IV. Causes of Delay

The Commission, in the Notice of Inquiry, has inquired as to what factors are chiefly responsible for delay, to the extent applications are not processed in a timely manner fashion. As we have mentioned, Minnesota Statutes, Section 15.99 imposes time limits on land use applications in Minnesota. Additionally, telecommunications right of way users have protections and remedies under Minnesota Statutes, Section 237.163 Subd. 4 (d), 5, and 8 (b). Minneapolis staff estimates that 99% of right of way use permits are approved. It is believed that often delay is on the other side as right of way applicants seek legal consultation over the terms of the permit or are required to draw plans to meet the standards necessary to have an effective City review of the application. It is our experience that experienced applicants know what is required and provide it.

V. Improvements in Processes.

The Commission has asked whether there are particular practices that can improve processing of broadband related applications. Minneapolis believes in a cooperative approach and also believes in making large amounts of information available on the internet. The City can accept online applications for excavation and obstruction permits and is currently working on a process to accept encroachment permits online. The Minneapolis Code of Ordinances is also available online. Minneapolis officials are available to discuss applications for permits at regularly established office locations. Any errors or omissions on plan sheets are discussed with applicants and resolved quickly. Co-trenching is permitted by the Minneapolis Code of Ordinances and encouraged by the permitting offices. This is mostly used in new construction where the opportunity to do so is available. Utility applicants that have not previously worked in the City of Minneapolis are encouraged to meet with all department representatives that are involved in the permitting process at an "introductory meeting." At the meeting, department

representatives explain the permitting process, plan sheet requirements and general construction and location standards. All telecommunication providers (and other utility owners) cooperate in utility location as required by Minnesota Statutes. One problem that we have noticed, as a result of the very competitive environment in which telecommunication providers operate, is that there is reluctance by providers to share their locations in advance for planning and design purposes. This can make urban planning in general and infrastructure planning specifically more difficult than it otherwise would be.

VI. Permitting Charges.

In the Notice of Inquiry the Commission has asked for data on current permitting charges. There are a variety of fees depending upon the particular project.

If the project involves excavation, we charge the following fees:

<u>Utility</u>	<u>Base Fee</u>	<u>Fee/Ft</u>
<u>Sewer Infrastructure</u>	<u>\$160</u>	<u>\$1.40</u>
<u>Water Infrastructure</u>	<u>\$160</u>	<u>\$1.40</u>
<u>Private Utilities, Inserting within Existing Conduit</u>	<u>\$230</u>	<u>\$0.07</u>
<u>Private Utilities, Bored Under the Surface</u>	<u>\$230</u>	<u>\$1.05</u>
<u>Private Utilities, All Others</u>	<u>\$230</u>	<u>\$1.25</u>

All sewer, water and repair permits will be \$160 up to 75 feet and \$1.40 per foot thereafter.

All other permits will be \$230 up to 75 feet with the per foot fee then varying with the kind of installation.

There have been numerous debates over what kind of fees to charge for excavation. Some communities charge flat fees, while other communities charge per foot fees. The City of Minneapolis has decided in essence to charge a flat fee for the first 75 feet of a project, but then to charge a per foot fee for those parts of the project over 75 feet. It is our experience and our studies have shown that it

costs more to permit and inspect the large projects than smaller projects. On the other hand, when you compare the smaller projects our fixed costs are such a dominant part of the picture that a flat fee makes more sense. As a larger city we do have some large projects and so do seek to recover our costs for inspecting and administering the permit process for large projects with a per foot fee after 75 feet. Our intent in setting our fees is always to recover our costs, both fixed and variable.

The City of Minneapolis also charges "lane use rates" for projects that require that a lane of traffic be shut down. These charges arose out of the work of the lane use task force that was investigating all of the delays to traffic caused by the multiple constructions projects that were taking place at the same time and shutting down lanes, often unnecessarily. This congestion and inconvenience also causes various costs to the City and the adjacent businesses. As you can see below, these costs include:

Lane Use Rates

<u>Downtown (CBD)</u>		<u>Arterial (Residential)</u>	
MOVING	\$1/FT/DAY	MOVING	.50/FT/DAY
PARKING	.25/FT/DAY	PARKING	.15/FT/DAY
BIKE LANE	.25/FT/DAY	BIKE LANE	.15/FT/DAY
SIDEWALK	.25/FT/DAY	SIDEWALK	.15/FT/DAY
ALLEY	.25/FT/DAY	ALLEY	.15/FT/DAY

VII. Local Policy Objectives

Local governments, as they manage public rights of way and public property, are typically not interested in just one objective or one set of objectives. The Federal Communications Commission, on the other hand, has very targeted objectives within the communications field. Local governments are simultaneously managing their rights of way for

many purposes. These include accommodating sewer, water, electric, and gas utilities. These include managing and improving stormwater, including flood control. Minneapolis city streets are being managed not only for automobile and truck traffic but also to create a pedestrian friendly environment, bicycle friendly environment, and an environment friendly to various types of public transit including buses, light rail transit, and possibly in the foreseeable future for streetcars. As a result, there are many different factors to balance in managing the public right of way. The right of way fits into a larger urban plan and a larger vision. This management and this balancing is the type of thing that can only be done by the local community. Safeguards against unfair treatment for any particular element of the urban mix are often appropriate. In Minneapolis, we have such safeguards already in place. There are comprehensive procedures for locating facilities in the public right of way pursuant to both State and local law. These procedures have appeal processes within the municipal environment. Additionally, under Minnesota Law municipal decisions can be reviewed by certiorari in the Minnesota Court of Appeals. City of Minneapolis v. Meldahl, 607 N.W.2d 168 (Minn.Ct.App. 2000), or in specific cases as determined by specific Statutes, in the Minnesota District Court. See Minnesota Statutes, Section 462.361 <https://www.revisor.mn.gov/statutes/?id=462.361> . This is in addition to any remedies that an applicant may have under the Telecommunications Act of 1996 and various other laws.

VIII. Possible Commission Actions.

The Commission asks what actions the Commission might take in this area. The City of Minneapolis strongly urges the FCC to refrain from regulating local right of way management and facility placement processes. These are processes that require the balancing of many policy considerations and specific facts that are not amenable to broad brush nationwide regulation. We are skeptical that national policies could fairly account for some of the unique features of various

communities. In our community, that includes an extensive system of bike ways, various transit options, and various best management practices relating to management of rights of way to handle stormwater and local flooding. ~~If the Commission acts in this area, it should limit itself~~ to voluntary programs and educational activities and implementing its own recommendations in the National Broadband Plan for working cooperatively with State and local governments.

CONCLUSION

The City of Minneapolis urges the Commission to conclude that right of way and facility management and charges are not impeding broadband deployment. Minneapolis has policies and procedures that are designed to provide a fair process for applicants to use our right of way and public property and to protect important local interest and to balance a wide variety of concerns. There is no evidence that these policies have prevented any company from reasonably providing broadband service here, and there are many reasons to believe that federal regulations in this area would prove costly and disruptive to a process that is already operating smoothly.

Respectfully submitted,



COREY M. CONOVER
ROBIN H. HENNESSY
Assistant City Attorneys
Minneapolis City Attorney's Office
350 South 5th Street, Room 210
Minneapolis, MN 55415
612-673-2182

Cc: National League of Cities, Bonavita@nlc.org
National Association of Counties, jarnold@naco.org
NATOA, straylor@natoa.org
The United States Conference of Mayors, rthaniel@usmayors.org